

United Nations Conference on the Law of Treaties

Vienna, Austria
First session
26 March – 24 May 1968

Document:-
A/CONF.39/C.1/SR.21

21st meeting of the Committee of the Whole

Extract from the *Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

47. The CHAIRMAN called for a vote on the deletion of article 15, sub-paragraph (a).³

At the request of the Austrian representative, the vote was taken by roll-call.

France, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: France, Ghana, Greece, Guinea, India, Indonesia, Iran, Ireland, Jamaica, Japan, Kenya, Liberia, Malaysia, Mauritius, Monaco, Mongolia, New Zealand, Norway, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, Sierra Leone, Singapore, Somalia, Sweden, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Afghanistan, Australia, Austria, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Canada, Chile, China, Colombia, Czechoslovakia, Federal Republic of Germany, Finland.

Against: Gabon, Guatemala, Holy See, Hungary, Iraq, Italy, Ivory Coast, Kuwait, Liechtenstein, Madagascar, Mali, Mexico, Netherlands, Nigeria, Pakistan, Peru, Poland, San Marino, Saudi Arabia, Senegal, South Africa, Spain, Switzerland, Yugoslavia, Zambia, Algeria, Bolivia, Ceylon, Congo (Democratic Republic of), Cuba, Dahomey, Ecuador, Ethiopia.

Abstaining: Israel, Morocco, Romania, Thailand, Tunisia, United Republic of Tanzania, Argentina, Central African Republic, Congo (Brazzaville), Cyprus, Denmark.

The proposal to delete article 15, sub-paragraph (a), was adopted by 50 votes to 33, with 11 abstentions.⁴

48. Mr. ALVAREZ (Uruguay) said that in voting for the deletion of sub-paragraph (a), his delegation had not been voting against the principle of good faith; it had only wished to intimate that it could not accept the terms in which that sub-paragraph was drafted.

49. Mr. GON (Central African Republic) said that the principle of good faith should apply both during the negotiating stage and at a later stage in the conclusion of a treaty. But in view of the ambiguous wording of sub-paragraph (a) his delegation had preferred to abstain from voting.

50. Mr. KRISPIS (Greece) said that his delegation's vote in favour of deleting sub-paragraph (a) should not be interpreted to mean that the Greek delegation was against the principle of good faith.

51. Mr. EL-ERIAN (United Arab Republic), explaining his vote, said that his delegation supported the principle stated in sub-paragraph (a), but had been unable to vote for the retention of that sub-paragraph because, as it stood, it raised too many problems.

52. The CHAIRMAN invited the Committee to vote on sub-paragraph (b) and (c).

53. Mr. GÖR (Turkey) suggested that the simplest procedure would be for the Committee to vote on the

retention or deletion of those sub-paragraphs. If they were retained, they could be referred to the Drafting Committee.

54. The CHAIRMAN suggested that the Committee should approve sub-paragraphs (b) and (c) in principle and refer them to the Drafting Committee with the various amendments.

It was so decided.⁵

55. Mr. DE BRESSON (France) explained why his delegation had felt bound to vote against article 15, sub-paragraph (a). That sub-paragraph might have legal consequences which it was difficult to foresee and which might be dangerous for the future of international relations. Many delegations wished to retain and to affirm the principle of good faith in the conduct of States during international negotiations. The French delegation was not opposed to that idea, which could be taken into consideration by the Drafting Committee, as the Expert Consultant had suggested. With regard to sub-paragraphs (b) and (c), the French delegation had already said that it was not opposed to the principles on which those sub-paragraphs were based, but much work was still needed to improve their wording.

Title of Part II, Section 2

56. The CHAIRMAN proposed that the Committee refer to the Drafting Committee the Hungarian amendment (A/CONF.39/C.1/L.137) deleting the words "to multilateral treaties" in the title of Part II, Section 2.

It was so decided.⁶

The meeting rose at 1 p.m.

⁵ For resumption of the discussion on article 15, see 61st meeting.

⁶ At the 28th meeting, the Chairman of the Drafting Committee announced that his Committee had decided to defer consideration of the titles of the parts, sections and articles.

TWENTY-FIRST MEETING

Wednesday, 10 April 1968, at 3.25 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 (continued)

Article 16 (Formulation of reservations) and Article 17 (Acceptance of and objection to reservations)

1. The CHAIRMAN invited the Committee to consider articles 16 and 17 together, and said that he would call first on delegations which had proposed amendments to both articles, then on those which had submitted amendments to article 16 and finally on those which had proposed amendments to article 17.¹

¹ The following amendments had been submitted:

To article 16: Republic of Viet-Nam, A/CONF.39/C.1/L.125; Colombia and United States of America, A/CONF.39/C.1/L.126 and Add.1; Federal Republic of Germany, A/CONF.39/C.1/L.128; Peru, A/CONF.39/C.1/L.132; Japan, Philippines and Republic of Korea, A/CONF.39/C.1/L.133 and Add.1 and 2; Poland, A/CONF.39/C.1/L.136; Ceylon, A/CONF.39/C.1/L.139; Spain, A/CONF.39/C.1/L.147. Amendments were subsequently submitted by China

³ The deletion of article 15, sub-paragraph (a) had been proposed in the amendments contained in documents A/CONF.39/C.1/L.61 and Add.1-4, L.72 and Add.1, L.122 and L.129.

⁴ As a result, the amendments proposing a revision of the wording of sub-paragraph (a) (A/CONF.39/C.1/L.112, L.130 and L.145) were not put to the vote.

2. Mr. KHLESTOV (Union of Soviet Socialist Republics), introducing his delegation's proposal (A/CONF.39/C.1/L.115) to combine articles 16 and 17, said that the situation with regard to reservations had changed considerably in the past thirty years. In current practice, multilateral conventions were often concluded by over a hundred States with widely differing social and political structures and legal systems, so that, although the object and purpose of the treaty might be common to all States, considerable differences might arise in respect of secondary provisions. The formulation of reservations was a satisfactory method of eliminating those difficulties and enabling large numbers of States to participate in international multilateral treaties, thus promoting widespread international co-operation. Practice had shown that such reservations did not impair the integrity of the treaty. The right to formulate reservations, moreover, derived from the sovereign right of States to defend the peculiarities of their individual legal systems.

3. In practice, reservations were formulated by all categories of States. A number of Asian and African countries entered reservations against colonial clauses appearing in certain agreements; for instance, when acceding to the Genocide Convention in 1963, Algeria had stated that it could not accept article XII of the Convention and that it considered that all the provisions of the instrument should apply to non-self-governing territories,² while Indonesia had formulated a similar reservation to the 1961 Single Convention on Narcotic Drugs.³ The Latin American countries had used reservations to protect their sovereign rights; for example, Colombia had formulated a reservation on signing the Geneva Convention on the Territorial Sea and the Contiguous Zone, stating that, under article 98 of the Colombian Constitution, authorization by the Senate was required for the passage of foreign troops through Colombian territory, and that, by analogy, the same reservation applied in connexion with the passage of foreign warships through Colombian territorial waters.⁴ Reservations had been made for the purpose of defending economic interests: thus, Iran had formulated a reservation to article 4 of the Geneva Convention on the Continental Shelf, with respect to the laying or maintenance of cables or pipelines on its continental shelf.⁵ Similarly, Guatemala, Chile, the United Arab Republic, and other States had entered reservations with respect

(A/CONF.39/C.1/L.161) and Malaysia (A/CONF.39/C.1/L.163), and Japan, Philippines and the Republic of Korea submitted a revised version of their proposal (A/CONF.39/C.1/L.133/Rev.1).

To article 17: Austria, A/CONF.39/C.1/L.3; Czechoslovakia, A/CONF.39/C.1/L.84 and L.85; Syria, A/CONF.39/C.1/L.94; Switzerland, A/CONF.39/C.1/L.97; France and Tunisia, A/CONF.39/C.1/L.113; United States of America, A/CONF.39/C.1/L.127; Ceylon, A/CONF.39/C.1/L.140; Spain, A/CONF.39/C.1/L.148; Thailand, A/CONF.39/C.1/L.150. Amendments were subsequently submitted by China (A/CONF.39/C.1/L.162) and Australia (A/CONF.39/C.1/L.166).

Amendments to replace articles 16 and 17 by a single article were submitted by the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115) and subsequently by France (A/CONF.39/C.1/L.169 and Corr.1).

² See *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions* (United Nations publication, Sales No.: E.68.V.3), p. 59.

³ *Ibid.*, p. 128.

⁴ *Ibid.*, p. 320.

⁵ *Ibid.*, p. 333.

to treaties where disputed territories were involved. Reservations had also been formulated in connexion with the compulsory jurisdiction of the International Court of Justice, and a number of countries had used reservations to protect their internal law with regard to the 1948 Convention setting up the Inter-Governmental Maritime Consultative Organization,⁶ which required them to amend their internal legislation where necessary. In none of those cases could reservations be regarded as impairing the integrity of the treaties involved.

4. In line with recent developments in the law on reservations, the International Court of Justice had rejected the thesis, upheld by the legal experts of the League of Nations, that the consent of all the contracting States was required to make a reservation valid. The Court's conclusion in respect of the Genocide Convention was that any State was entitled to formulate a reservation,⁷ and the International Law Commission, in its text of articles 16 and 17, confirmed that trend.

5. Nevertheless, the Commission's text was rather cumbersome and occasionally contradictory, and the Committee should endeavour to draft provisions which reflected the principles on which modern practice was based. In its proposed single article, the Soviet Union delegation began by stressing the right of all States to formulate reservations and the consequent right of any contracting State to object to a reservation. Sub-paragraph (a) of the Commission's article 16 seemed to be unnecessary, since cases where reservations were prohibited by the treaty were extremely rare. Moreover, retention of the sub-paragraph would have the effect of laying down a rule which formed an exception, thus restricting the power of States to make reservations. Sub-paragraph (b) also seemed unnecessary as well as restrictive of the sovereign rights of States. Furthermore, it contradicted paragraph 1 of the Commission's article 17. Since article 16, sub-paragraph (b), precluded the formulation of a reservation other than those specified in a treaty, whereas article 17, paragraph 1, stated that reservations authorized by the treaty required no subsequent acceptance by the other contracting States, reservations not specified in the treaty might be held to be admissible, but to require acceptance by the other contracting States.

6. Paragraph 3 of the Commission's article 17 should also be deleted, since the sovereign right of States to formulate reservations could not be made dependent on the decisions of international organizations. Since the constituent instruments of international organizations were international multilateral treaties within the meaning of articles 1 and 4, his delegation could not agree with the view, expressed in paragraph (20) of the commentary to the articles, that the integrity of the instrument might be impaired unless the reservation was accepted by the organization in question; the reservation would in any case be subject to the test of compatibility with the object and purpose of the treaty.

7. Mr. BRIGGS (United States of America), introducing his delegation's amendments to articles 16 and 17, said that the International Law Commission's articles restated the law on reservations in the light of modern conditions.

⁶ *Ibid.*, pp. 261-264.

⁷ *I.C.J. Reports, 1951*, p. 15.

The United States delegation appreciated the endeavour of the Soviet Union delegation to combine the two articles, and saw considerable merit in some of the USSR suggestions, although its proposed text left out some essential provisions.

8. In its amendment to article 16 (A/CONF.39/C.1/L.126 and Add.1), his delegation proposed the deletion of sub-paragraph (b), which set out the unduly rigid rule that, where a treaty authorized specified reservations, no other reservations could be made. It was difficult for negotiators to anticipate all the reservations which a particular State might find necessary if it was to become a party to the treaty. The United States amendment to sub-paragraph (c) had been introduced because it was uncertain whether the traditional reference to the object and purpose of the treaty covered the concept of the nature and character of the treaty; that concept had been referred to as a separate criterion in determining the possibilities of making reservations by the International Court of Justice in the Genocide Convention case, referred to in paragraph (4) (d) of the commentary.

9. In its amendment to paragraph 2 of article 17 (A/CONF.39/C.1/L.127), the United States had proposed a similar reference as a separate criterion. It would be possible to redraft the paragraph to read "When the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties", thus omitting any reference to criteria. The Drafting Committee might consider that suggestion. Since, however, the Commission's draft of the paragraph set out two criteria for identifying such treaties, the United States delegation considered that the character of the treaty should be added. In particular, the criterion of a limited number of States seemed to ignore the character of the treaty, for a treaty to which a large number of States were parties might be of such a nature that a reservation would be permissible only if accepted by all the parties.

10. In view of the Committee's decision to exclude international organizations from the scope of the convention and to retain article 4, it might be questioned whether paragraph 3 should also be retained. The United States considered that the clause should be kept, since the provisions of article 4 on constituent instruments of international organizations could not be applied before the establishment of the organization, and paragraph 3 would have the effect of postponing acceptance of reservations until an organization was in a position to consider them. The purpose of the United States amendment to paragraph 3 was to provide that any contracting State might object to a reservation to the constituent instrument of an international organization, even if the reservation had been accepted by the competent organ of that organization. Although some of those reservations might be of such a nature as to require application by all parties in their relations with the reserving State, others might not be of such a character and might be regarded as highly objectionable to other States.

11. The purpose of the United States amendment to paragraph 4 was to extend the applicability of the prohibited categories of reservations set out in article 16 to the decisions made by States under paragraph 4 of

article 17 in accepting or objecting to a proposed reservation. In particular, the proposal would preclude acceptance by another contracting State of a reservation prohibited by the treaty, and the test of incompatibility with the object or purpose of the treaty set out in sub-paragraph (c) of article 16 would then be applicable to such acceptance or objection. It was a shortcoming of sub-paragraph (c) that it laid down a criterion of incompatibility for a prohibited reservation, but failed to make it explicitly applicable to the acceptance or objection to a reservation.

12. The United States amendment to sub-paragraph 4 (a) was merely designed to clarify an ambiguity in the Commission's text; acceptance of a reservation by another contracting State, which, under sub-paragraph 1 (f) of article 2 might or might not be a party to a treaty, could not constitute the reserving State a party to the treaty unless the treaty became binding on both States. The point should be referred to the Drafting Committee.

13. Finally, the purpose of the United States amendment to paragraph 5 was to provide some flexibility for the drafters of a treaty. The Commission's text seemed to prevent the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months.

14. The United States delegation would not ask for a vote on any of its amendments except its proposal to extend the incompatibility test laid down in article 16 to the acceptance of or objection to a reservation under paragraph 4 of article 17.

15. Mr. PINTO (Ceylon), introducing his delegation's amendments to article 16 (A/CONF.39/C.1/L.139) and article 17 (A/CONF.39/C.1/L.140), said that the purpose of the former was to replace the International Law Commission's text by the simple rule that a State might formulate a reservation if, and to the extent that, the terms of the treaty concerned so provided. That proposal in itself contained nothing new, but it carried with it a rule of interpretation, namely, that if the treaty did not provide for reservations, it should be presumed that the intention of the parties had been not to admit reservations. That rule of interpretation should not be construed as an attempt to restrict the sovereign right of States to make reservations; it merely sought to ensure that, if States wished to exercise that right, they should do so at the time of negotiation, and make provision for reservations in the treaty. The residuary rules in article 17 provided a system for regulating the procedures and relationships arising out of such reservations.

16. It might be argued that such a rule was inconsistent with the provisions of the International Law Commission's article 16, but the Ceylonese delegation considered that that text did not lay down any rule, but merely stated a factual situation. The article proposed by his delegation, on the other hand, did not run counter to any established rule of international law, and had a number of advantages: it could remove doubts as to whether reservations were permitted when the treaty made no express provision to that effect; it could encourage States to consider carefully at the time of negotiation whether and to what extent reservations should be permitted and how they should be dealt with; taken together with the residuary rules in article 17, it could ease the burden on depositaries

by providing them with clear instructions on the processing of reservations; and it would help to maintain a greater degree of uniformity and order in treaty relationships.

17. The Ceylonese delegation had submitted its amendments because it did not consider article 16 satisfactory and also because of the very nature of the draft convention: since the Conference was engaged in laying down rules which were likely to remain in force for many years to come, it must try to ensure that only positive and progressive rules were embodied in the instrument. It was not always enough to state the law as it stood; the Conference must be prepared to lay down guidelines for the future.

18. Mr. CUENCA (Spain), introducing his delegation's amendments to article 16 (A/CONF.39/C.1/L.147) and article 17 (A/CONF.39/C.1/L.148), said that the flexible procedure embodied in articles 16 to 20 was satisfactory and met the needs of contemporary practice. The purpose of his amendments was to give a more precise expression to the rules embodied in the articles.

19. Paragraph 2 of its amendment to article 16 would replace the "object and purpose" of the treaty by the "nature, object or purpose" of the treaty as the criterion for the compatibility test. That more precise language would be less open to arbitrary interpretation—a matter of great importance, since article 16 governed the operation of all the subsequent articles on reservations. His delegation insisted on that point because it could not accept the contention that there existed an unlimited right to make reservations. Reservations introduced an element of relativity and subjectivity into treaty relations and must therefore be made subject to objective criteria, so as to limit the absolute freedom of States in the interests of international co-operation; and multilateral treaties constituted the technical instruments of that co-operation.

20. In paragraph 1(b) of its amendment to article 16, his delegation proposed that no reservations be permitted to a treaty which was the constituent instrument of an international organization, in order to protect that type of treaty at the beginning of its existence. A careful examination of the discussions in the Sixth Committee at the fifteenth session of the General Assembly on the question of reservations to the constituent instrument of the Inter-Governmental Maritime Consultative Organization indicated that the integrity of a constituent instrument would not be adequately safeguarded by the provisions of article 17, paragraph 3, as they stood. Those provisions would admit reservations at the inception of the organization, when its organs were not yet in operation. If the reserving States were themselves in a majority among those who had ratified the constituent instrument, they would be able to decide in the competent organ in favour of the acceptance of their own reservations. The result would be to bring about an amendment of the constituent instrument by the indirect means of reservations.

21. For those reasons, his delegation also proposed (A/CONF.39/C.1/L.148) that article 17 should specify that a reservation to the constituent instrument of an "existing international organization" required the acceptance of the competent organ of that organization.

It was only when an organization was already in existence that reservations could be admitted. The position during the existence of the organization was radically different from that which obtained at its inception. The acceptance of the reservations would then be a matter for a collegiate decision rather than for the application of the flexible procedure embodied in the International Law Commission's articles on reservations.

22. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said that his delegation's amendment to article 16 (A/CONF.39/C.1/L.125) was of a drafting character and could be referred to the Drafting Committee. He supported the amendment by Japan, the Philippines and the Republic of Korea (A/CONF.39/C.1/L.133 and Add.1 and 2).

23. Mr. FLEISCHHAUER (Federal Republic of Germany) said that his delegation proposed the deletion of sub-paragraph (b) of article 16 for the reasons given by the Soviet Union and United States representatives. That paragraph would not promote the progressive development of international law and constituted a restriction on the freedom of States. It also failed to clarify the rules on reservations. It should be noted, for example, that in their optional declarations under Article 36, paragraph 2, of the Statute of the International Court of Justice, States had made reservations which were quite different from those expressly permitted in the article and that those declarations had been accepted without any objection to the reservations which they contained.

24. He agreed with the Soviet Union and United States representatives that there was a contradiction between article 16 and article 17, paragraph 1, which would have to be eliminated.

25. Mr. CALLE Y CALLE (Peru) said that in recent years the traditional rigid criterion of unanimous consent to a treaty had given way to a more flexible conception of the compatibility test. All States possessed the sovereign right to make reservations at the stage of signature or ratification, accession or approval. Article 16 mentioned three cases where that right was subject to limitation. There was a fourth kind of inadmissible reservation, namely reservations which in a general and indeterminate manner made the acceptance of a treaty subject to internal laws. Reservations of so broad and indefinite a character did not satisfy the notion of compatibility and were tantamount to a negation of the consent to be bound. Consequently, his delegation had proposed the insertion of a new sub-paragraph in article 16 (A/CONF.39/C.1/L.132).

26. Mr. TSURUOKA (Japan), introducing his delegation's proposed amendment to article 16 (A/CONF.39/C.1/L.133 and Add.1 and 2), said that it contained three main points. First, it proposed to transfer the provision concerning compatibility with the object and purpose of the treaty to the introductory part of article 16, since the criterion of compatibility should be applicable to all cases, and not only to the cases where the treaty was silent on reservation, irrespective of whether a reservation was or was not prohibited by the treaty.

27. The second point was of a more substantive nature. The question of reservations to multilateral treaties was

one of the most difficult and controversial subjects in contemporary international law and had given rise to controversy in academic circles and problems in the practice of States. His delegation appreciated that the International Law Commission had made commendable efforts to frame a satisfactory rule, but the solution proposed by the Commission was not entirely satisfactory. In its written comments in 1964,⁸ his Government had taken exception to the rules proposed by the Commission and had advocated the retention of the traditional unanimity rule. States had no inherent right to put forward whatever reservation they pleased. An international agreement was almost always the result of a compromise between conflicting interests, and if the balance could be upset, through the loophole of reservations, the whole system established under the treaty might fall to the ground. The parties were entitled to protect the integrity of an agreement. It should also be borne in mind that the rules being proposed in the draft were residual and applicable only when the treaty was silent.

28. Believing as it did that that basic approach to the question of reservations was the right one, the delegation of Japan was at the same time aware of the fact that the Conference provided a unique opportunity for working out a satisfactory formula acceptable to the great majority of States. That was why it had decided to submit its amendment, in the hope of improving the formula proposed by the International Law Commission.

29. The purpose of the Japanese amendment was to make the compatibility test an objective and workable one. The Commission, while adopting the principle of compatibility as the basic criterion, had not succeeded in raising that principle to the status of an effective rule of law. Under the terms of article 16, paragraph 1(c), a State might formulate a reservation incompatible with the object of the treaty and therefore in law invalid, yet that reservation could be accepted by another contracting State under article 17, paragraph 4, and upheld as a legitimate reservation. In order to avoid such a result, a system should be created under which the views of the parties on the question of compatibility should be ascertained. Under the system his delegation proposed, a reservation must be communicated to all the contracting States; after the expiry of a specified period, which he tentatively suggested might be three months, if objections had then been raised by a majority of the contracting States, the reservation would fall to the ground. That system would have the merit of applying a collegiate decision without unduly complicating the procedure.

30. Mr. MAKAREWICZ (Poland) said that the rule stated in sub-paragraph (b) of article 16 should be confined to cases where the treaty authorized only specified reservations, as proposed in his delegation's amendment to that sub-paragraph (A/CONF.39/C.1/L.136).

31. He supported the Soviet Union amendment (A/CONF.39/C.1/L.115).

32. Mr. VEROSTA (Austria) said that a reservation could only be accepted once the competent organ had

been properly constituted. That should be made clear in article 17, but perhaps, as the article was already lengthy, the content of his delegation's amendment (A/CONF.39/C.1/L.3) should be incorporated in a separate article.

33. Mr. SMEJKAL (Czechoslovakia) said that no treaty relationship existed between a State objecting to a reservation and a State making the reservation. The former had the right to decide whether the treaty was in force between them. It would be remembered that the Czechoslovak, Soviet Union, Iranian, Tunisian and other Governments had put forward reservations to the Convention on the Territorial Sea and the Contiguous Zone⁹ and to the Convention on the High Seas¹⁰ concerning provisions about the immunity of ships and the definition of piracy. Those reservations had been objected to by the United Kingdom Government¹¹ and, as a consequence, the Conventions were not in force between it and the Governments which had made the reservations.

34. The Czechoslovak amendment to article 17 (A/CONF.39/C.1/L.84) could be referred to the Drafting Committee.

35. Mr. NACHABE (Syria) said that the traditional doctrine had given the maximum effect to objections to reservations to multilateral treaties. Thus, it had been enough for one State to raise an objection for the treaty to cease to be in force, not only between the objecting State and the State which had made the reservation but between all the parties. However, an evolution had taken place which had been fostered by the Advisory Opinion of the International Court of Justice in 1951 on the question of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, when it had replied as follows to question 1: "That a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention".¹²

36. The Commission had rightly taken that evolution into account in article 17, paragraph 4(b), and article 19, paragraph 3, but perhaps it had not laid sufficient stress on the fact that separability of treaty provisions was allowed by article 41. There was no need for a reservation which related only to one or two provisions of a treaty to be extended to all of them. That was particularly true of general multilateral treaties of common interest to the international community, in which the widest possible participation was desirable. For example, supposing a multilateral convention on the elimination of racial discrimination were drawn up which contained an article providing for the compulsory submission of disputes to the International Court of Justice and a State made a reservation to that article, it would be wiser to restrict that reservation to the article alone so

⁹ See *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions* (United Nations publication, Sales No.: E.68.V.3), pp. 320 and 321.

¹⁰ *Ibid.*, pp. 325 and 326.

¹¹ *Ibid.*, pp. 323 and 328.

¹² *I.C.J. Reports, 1951*, p. 29.

⁸ *Yearbook of the International Law Commission, 1966*, vol. II, p. 303.

that all the remaining provisions of the treaty remained in force.

37. In its amendment to article 17 (A/CONF.39/C.1/L.94), his delegation had sought to bring out the primacy of the will of the State which had formulated the objection and which had the last word. If it considered that a reservation to certain provisions deprived the treaty of all meaning and that it would therefore be useless to maintain the treaty in force between itself and the reserving State, it could indicate its intention to put an end to the treaty as a whole and that intention must prevail.

38. Mr. CUENDET (Switzerland) said that the Swiss delegation supported the system formulated by the Commission. The amendments which had been submitted would serve to clarify the text.

39. The intention of article 17, paragraph 1, was to exclude from the procedure for accepting reservations those reservations which were permitted by the treaty. The provision was logical and necessary, but it was not clearly worded and might give rise to differences of opinion on whether a reservation was impliedly authorized or not. The decision on that point would rest with each State party to the convention and could easily lead to considerable legal uncertainty. Moreover, the present wording reduced the scope of the procedure for the acceptance of reservations laid down in paragraph 4, which in fact would operate only in the case of the reservations referred to in article 16, sub-paragraph (c), namely, those contrary to the object and purpose of the treaty. The flexibility of the International Law Commission's system was realistic and in conformity with the present trend of international law. But, except in cases where the reservation was provided for in the treaty, it seemed necessary to permit each State to form an opinion with regard to it. His delegation proposed (A/CONF.39/C.1/L.97) the deletion of the words "or impliedly" in article 17, paragraph 1.

40. His delegation also proposed that article 17, paragraph 3, be deleted. That paragraph dealt with a situation when a constituent instrument had not yet come into force, so that no organs existed to approve the reservations, or else, if the constituent instrument had come into force, with conditions of entry to an organization, rather than with reservations and it would be better not to deal with the former question in the present draft.

41. Lastly, the Swiss delegation proposed the insertion of the words "and unless the reservation is prohibited by virtue of article 16, sub-paragraphs (a) and (b)", at the end of the introductory phrase to article 17, paragraph 4. That would maintain the Commission's system. The fate of reservations contrary to sub-paragraphs (a) and (b) should be determined. They could not be accepted by other States and it must also be made absolutely clear that, as the Commission intended, it was States themselves which should decide whether or not a reservation was compatible with the object and purpose of a treaty. It would be perfectly plain that the procedure in paragraph 4 of the amended text would apply to two categories of reservations, those which were not prohibited in article 16(a) and (b) and those contemplated in article 16(c).

42. Mr. ABED (Tunisia), introducing the amendment by his delegation and that of France to article 17 (A/CONF.

39/C.1/L.113), said that its purpose was to introduce greater clarity and precision into the provisions of the article in order to avoid interpretations which could lead to disputes in the application of treaties, or delay their coming into effect.

43. In paragraph 1, it was proposed to delete the words "or impliedly". The provisions of that paragraph were very important, since they specified that a reservation "expressly or impliedly" authorized by the treaty did not require any subsequent acceptance by the other contracting States. The concept of an "implied" acceptance was difficult to elucidate and interpret; the question would arise of who was to determine the existence and scope of such implied acceptance. The deletion of those words would make for a more precise rule, and would encourage the parties to express unequivocally in the treaty their intentions on the subject of reservations.

44. As for paragraph 2, its wording was extremely vague and imprecise; moreover, it could lead to an excessively restrictive interpretation of the article as allegedly covering only multilateral treaties, to the exclusion of bilateral treaties. In fact, bilateral treaties had been among the first to give rise to reservations. It was true that, in that case, the making of a reservation and its acceptance amounted in effect to a modification of the treaty, but the parties sometimes resorted to that procedure as a means of overcoming difficulties created by internal constitutional procedures for the acceptance of treaties. Signature of the treaty was thus not delayed and the desired changes were obtained without having to reopen the negotiations. The amendment therefore proposed that a reference to bilateral treaties be introduced in paragraph 2, the language of which had been made simpler and clearer.

45. Lastly, it was proposed to delete paragraph 3 as superfluous. There was no need to state the obvious fact that a reservation to the constituent instrument of an international organization required the acceptance of the organization. Also, if the paragraph were retained, it would give rise to difficulties regarding the interpretation of the expression "competent organ" of the organization.

46. Mr. SUPHAMONGKHON (Thailand), introducing his amendment to article 17 (A/CONF.39/C.1/L.150), said that he found generally acceptable both the underlying ideas and the substance of the rules embodied in articles 16 and 17. However, in its efforts to ensure flexibility and to cover as many cases as possible, the International Law Commission had drafted article 17 in a manner which made some of its provisions difficult to apply. The main purpose of his amendment was to remedy those difficulties.

47. In paragraph 1, he proposed the deletion of the words "or impliedly" which would introduce an element of uncertainty in the application of the general rule embodied in that paragraph and would make the interpretation of the rule extremely difficult, especially in borderline cases. The reference to implied authorization in the treaty might conceivably be interpreted as covering the provisions of sub-paragraph (c) of article 16 on the compatibility test; a reservation which was impliedly authorized in the treaty would thus not need to comply with the compatibility test. It was necessary to exclude such an interpretation, since a party should always be able to object that a reserv-

ation was incompatible with the object and purpose of the treaty unless the reservation was expressly authorized by the treaty; the application of the compatibility test should remain in the hands of the parties.

48. In paragraph 4, he proposed that the opening proviso, "In cases not falling under the preceding paragraphs", be replaced by: "Subject to the preceding paragraphs", which provided a better link with the first three paragraphs, particularly paragraph 1. Lastly, he proposed that paragraph 5 should become the concluding subparagraph of paragraph 4; the twelve-month period would then be applicable in all cases where no objection was made to a reservation.

49. Except for the amendment to paragraph 1, all those proposals were of a drafting character and could be referred to the Drafting Committee.

50. Mr. TABIBI (Afghanistan) said that his delegation was in general agreement with the basic principles contained in draft articles 16 and 17, which reflected contemporary State practice with regard to reservations.

51. The institution of reservations had been acquiring increasing importance ever since the General Act of Brussels of 1890, the reservation of China to the Treaty of Versailles in 1919, and the rejection of the Austrian reservation to the 1925 Opium Convention. The need to ensure the universality of international treaties, combined with the increase in the number of States, and still more in the number and variety of treaties, made it impossible to apply the old unanimity rule; reservations had become a necessity, particularly for the smaller nations.

52. United Nations organs, such as the International Court of Justice in its 1951 Advisory Opinion in the case of the Genocide Convention and the General Assembly in 1952 and 1959, had made a thorough study of reservations and had arrived at conclusions which derived from State practice in the past half century and were reflected in the International Law Commission's draft articles 16 and 17.

53. He therefore broadly supported the draft of the two articles and did not favour amendments that might disturb the flexible provisions it contained. He could, however, accept amendments to improve the wording. He accordingly wished to give his first reaction to some of the proposed amendments.

54. He was prepared to support the Austrian amendment (A/CONF.39/C.1/L.3) and also the amendment by France and Tunisia (A/CONF.39/C.1/L.113) to paragraphs 1 and 2 of article 17, but not the proposal to delete paragraph 3 since that would hamper the smooth operation of international agreements; and he of course opposed the similar proposal by Switzerland (A/CONF.39/C.1/L.97). The Drafting Committee should be asked to consider the Czechoslovak amendments (A/CONF.39/C.1/L.84 and L.85), the Syrian amendment to paragraph 4 of draft article 17 (A/CONF.39/C.1/L.94), which was not contrary to the provisions of that draft and which could promote participation in international treaties, and the amendments by the Republic of Viet-Nam (A/CONF.39/C.1/L.125), Spain (A/CONF.39/C.1/L.147 and L.148) and Thailand (A/CONF.39/C.1/L.150).

55. On the whole he supported the USSR amendment (A/CONF.39/C.1/L.115), but could not support either the

United States amendments (A/CONF.39/C.1/L.126 and Add.1 and L.127) or the amendment by the Federal Republic of Germany (A/CONF.39/C.1/L.128), which would create problems for the making of reservations and hinder the wider application of international treaties. Nor could he support the amendment by Peru (A/CONF.39/C.1/L.132), because it introduced considerations of internal law into the matter of reservations to international treaties.

56. The International Law Commission's draft, despite its admitted shortcomings, represented the best possible compromise formula for the time being, and he hoped that the authors of the many amendments, which in some cases covered more or less the same ground, would bear that fact in mind when, as he hoped, they met to formulate joint amendments in order to facilitate the work of the Committee.

57. Mr. REGALA (Philippines), speaking as a joint sponsor of the Japanese amendment (A/CONF.39/C.1/L.133 and Add.1 and 2), said that, apart from the reasons adduced by the Japanese representative, it was a settled principle of international law that a State which entered into a treaty had the power freely to make reservations.

58. As now drafted, paragraph 4 of article 17 was not clear. The purpose of the amendment by Japan, the Philippines and the Republic of Korea was to introduce, by way of an additional provision in article 16, a time-limit upon the expiry of which the reservation would be without effect if objections had been raised by a majority of the contracting States on the ground that the reservation was incompatible with the object and purpose of the treaty. His delegation was not committed to the set period of three months and would be prepared to accept a time limit of six months or even a year, provided some definite deadline was specified.

59. Mr. SEPULVEDA AMOR (Mexico) said he warmly supported the flexible principle embodied in the International Law Commission's draft articles 16 and 17. The harmful effect of reservations on the integrity of the treaty should not be over-emphasized. The integrity of the treaty could be maintained provided a sufficient number of States were parties to the treaty and accepted most, or preferably all, its fundamental clauses. The integrity of the treaty was materially affected only if a large number of States formulated a reservation touching the very essence of the treaty. Far from ignoring that point, the International Law Commission had clearly specified that reservations could only be formulated if they were compatible with the object and purpose of the treaty. Its flexible system, based on that compatibility test, made it easier for some States to express their final consent to be bound by a treaty and thereby promoted participation in multilateral treaties. An adequate balance was thus established between the respect due to the interests of States and the need to promote international co-operation, bearing in mind that the whole purpose of the negotiation of a multilateral agreement was to arrive at the conclusion of a treaty.

60. He was in favour of paragraph 4(b) of article 17, which made it possible for the objecting State to avoid entering into treaty relations with the reserving State and would enable States to adjust the degree to which they would enter into treaty relations with each other.

61. He was also in favour of paragraphs 2 and 3 of article 17 on treaties between a limited number of States and treaties which were constituent instruments of international organizations.

62. That being said, he must draw attention to the absence of a definition of the instrument envisaged in paragraph 2(b) of article 27. In fact, interpretative declarations of that type were common in practice. Such a declaration did not amount to a reservation and its purpose was generally to overcome certain difficulties arising from internal constitutional provisions on treaty-making. It was essential to set forth clearly the legal effects of such declarations, as distinct from those of actual reservations. The consequences of objection by one or more parties to the treaty, but not all the parties, to an interpretative declaration made by one State, should also be examined. The point should certainly be covered, because the view had been propounded in academic circles that an interpretative declaration had all the characteristics of a reservation, a theory to which reference was made in the International Law Commission's commentary to the draft articles, notably in paragraph (11) of its commentary to article 2. If it was accepted that such declarations often had their own special features, then separate provision must be made for them.

63. With regard to article 17, particularly paragraph 4, it was important to determine the legal consequences of a subsequent judicial decision declaring a reservation incompatible with the object and purpose of the treaty. There were two possible solutions. One was that an obligation should be placed upon the reserving State to withdraw its reservation; should it fail to do so, it would be precluded from becoming a party to the treaty. The other solution was for the treaty in its entirety to be deemed to cease to be in force exclusively in the relations between the reserving and objecting States.

64. In paragraph 4(a), it was important to consider the practical situation which would arise for a reserving State in the not infrequent case in which no other State had expressly accepted its reservation. The provision for a twelve-month time-limit contained in paragraph 5 of article 17 would settle the problem after the expiry of that period. The question still arose, however, of determining the position during that twelve-month period in the case to which he had referred. The provisions of the draft did not make it clear whether the reserving State was or was not a party to the treaty during that period. The point must be covered in order to avoid a legal vacuum, and the Czechoslovak amendment (A/CONF.39/C.1/L.84) could contribute to a solution to the difficulty.

65. He had drawn attention to those gaps in articles 16 and 17 without submitting any formal amendments but requested that his remarks be taken into consideration by the Drafting Committee.

66. Mr. RUIZ VARELA (Colombia) said he supported the United States amendments to articles 16 and 17 (A/CONF.39/C.1/L.126 and Add.1 and L.127). In the matter of reservations to multilateral treaties, there had been a traditional and marked divergence between the rules accepted within the Pan American system and the practices followed by the League of Nations and, more recently, by the Secretariat of the United Nations, a divergence to which the commentary on the draft articles

referred. There was, however, every indication that the International Law Commission's formula would make it possible to overcome the difficulties which had arisen in the matter by providing a flexible formula offering equitable and well-founded solutions to the problems involved. The Commission had achieved considerable success in reconciling the two different systems and the various trends and practices in what was an extremely difficult matter. One example was that of the provisions of paragraph 1 of article 17, which did not require the unanimous acceptance of a reservation on the part of the other contracting States unless the treaty itself so required. Moreover, paragraphs 4(a) and 4(b) of the same article appeared to him to embody two of the substantive rules of the Pan American system.

67. On the problem of reservation to bilateral treaties, he noted the Commission's remarks in the second and third sentences of paragraph (1) of its commentary.

68. Despite its merits, the flexible formulation embodied in articles 16 and 17 could be still further improved by introducing greater precision into them as proposed in the United States amendments. In particular, the amendment to sub-paragraph (b) of article 16 (A/CONF.39/C.1/L.126 and Add.1) would eliminate an unnecessary repetition; sub-paragraph (a) already precluded a reservation which was prohibited by the treaty and would therefore cover the case where a treaty authorized only certain "specified reservations". The proposed amendment to sub-paragraph (c) of article 16 (A/CONF.39/C.1/L.126) would serve to avoid uncertainties in the interpretation of the meaning of the concept of "object" of the treaty.

69. He also supported the United States amendments to article 17 (A/CONF.39/C.1/L.127) which would also serve to introduce greater legal precision into the text of that article.

70. Mr. SINCLAIR (United Kingdom) said that in the past his Government had been a strong advocate of the traditional unanimity doctrine, under which a reservation, in order to be valid, must be accepted by all the other interested States. That doctrine was based on the concept of the integrity of the terms of a treaty which had been freely negotiated by the prospective parties, and it provided an unambiguous answer to the question whether a State which had submitted an instrument of ratification or accession, accompanied by a reservation, had become a party to the treaty generally, rather than simply in relation to those contracting States which had accepted the reservation.

71. The question of whether and, if so, to what extent reservations to multilateral conventions should be admitted raised fundamental problems concerning the quality and extent of the obligations undertaken or to be undertaken by the contracting parties. It could be assumed that exhaustive attempts would have been made at the stage of negotiation to find formulae which would command the broadest possible support among the negotiating States, and the question arose whether the structure and meaning of the treaty as a whole should be distorted in relations between the contracting parties by reservations involving acceptance by the reserving State of lesser obligations than those contained in the treaty. During the negotiations, sacrifices would unquestionably have been made by the representatives of

most of the negotiating States, and the resulting treaty was usually an amalgam of conflicting interests and views. In principle, therefore, there was considerable force in the view that reservations introduced after such complex procedures should require the acceptance of all the contracting parties before the reserving State could be regarded as a party to the treaty.

72. The United Kingdom recognized that the traditional unanimity rule might in modern times be a counsel of perfection, since it had been rendered less practicable by the great expansion of the membership of the international community in recent years. Furthermore, the system applied by the Secretary-General of the United Nations since 1952 for new multilateral treaties deposited with him was much more flexible, as the International Law Commission had pointed out in paragraph (8) of its commentary. The practical effect of that system was that a State which had deposited an instrument of ratification or accession accompanied by reservations was considered to be a party to the treaty at least by the majority of States which did not object to the reservations. But even that more flexible system fell far short of the asserted sovereign right to make unlimited reservations, which the USSR representative had advocated. The United Kingdom delegation believed that no State possessed such an unlimited right and consequently would oppose the proposal to delete sub-paragraph (a) of article 16 and could not support the proposal to delete sub-paragraph (b). The parties were always entitled to agree among themselves that no reservations should be permitted to a particular treaty or that only specified reservations should be accepted.

73. Although the ideal solution to the problem of reservations was to ensure that the treaty itself dealt with the question, practical experience showed that, more often than not, the treaty was silent on the matter, not necessarily because the negotiating States had ignored the question of reservations, but usually because they had been unable to reach an agreed solution. The content of a reservations article would undoubtedly raise precisely those questions of substance and of principle which had been disputed during the negotiations leading to the adoption of the text: State A might wish to ensure that reservations were permissible to articles X and Y, State B might insist that reservations should be admitted to articles K and Z, whereas State C might object strongly to the admissibility of reservations to some or all of those articles. As a result, the negotiating States might reluctantly decide to dispense with a reservations article, so as not to disturb the delicate balance of interests they had reached in formulating the treaty. That was why the Conference was obliged to legislate for situations where a treaty made no positive provision with respect to reservations.

74. With regard to the Commission's text of articles 16 and 17, he wished to draw particular attention to the combined effect of article 16, sub-paragraph (c), and article 17. Sub-paragraph (c) provided that, in cases where the treaty was silent with regard to reservations, a reservation might be formulated unless it was incompatible with the object and purpose of the treaty. That compatibility test reflected the Advisory Opinion of the International Court of Justice in the Genocide Convention case, but the mere statement of the test raised questions which were not fully answered in the Commission's

proposals. At first sight, the compatibility test seemed to be objective, but it might be asked whether a reservation which was objectively incompatible with a treaty could be accepted by another contracting State under sub-paragraph 4(a) of article 17; if so, the effect of the compatibility test in sub-paragraph (c) of article 16 might be nullified. It was to be presumed that a State which was prepared to accept another State's reservation considered that reservation to be compatible with the treaty, even though the majority of the other contracting States disagreed with that assessment. If that was a correct interpretation of the combined effect of sub-paragraph (c) of article 16 and paragraph 4 of article 17, then clearly the compatibility test might prove in practice to be devoid of any real substance.

75. The International Law Commission's proposals seemed to give too much latitude to the formulation of reservations which could have the effect of destroying the integrity of the treaty. Paragraph (21) of the commentary appeared to confirm the assumption that, under sub-paragraph 4(b) of article 17, an objection could be made to a reservation on grounds other than the incompatibility of the reservation with the object and purpose of the treaty. It would therefore be desirable to clarify the text on that point.

76. The United Kingdom delegation considered that those issues should be thoroughly explored and, in particular, that some real content must be given to the compatibility test in sub-paragraph (c) of article 16. There was an obvious need for some kind of machinery to ensure that the test was applied objectively, either by some outside body or through the establishment of a collegiate system for dealing with reservations which a large group of interested States considered to be incompatible with the object and purpose of the treaty. His delegation had not so far submitted any specific proposals on the topic but hoped that its suggestion for controlling machinery to ensure that the test was properly applied would be borne in mind during subsequent debates. It would be helpful if the Committee were to concentrate first on questions of principle arising out of the draft articles and the various amendments submitted; the topic was so complex that any hasty decision would be inadvisable.

The meeting rose at 6 p.m.

TWENTY-SECOND MEETING

Thursday, 11 April 1968, at 11 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 (continued)

Article 16 (Formulation of reservations) and Article 17 (Acceptance of and objection to reservations) (continued)¹

1. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) stressed the importance of reservations, which made it

¹ For a list of the amendments submitted to articles 16 and 17, see 21st meeting, footnote 1.